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Supreme Court, U.S.
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In The

Supreme Court of the United States

JOAN MANN, KEN DANKS d/b/a TEK INDUSTRIES, TRACY WILKIE, CHRISTA MONETTE, and other persons similarly situated,

Petitioners,

v.

ND TAX COMMISSIONER, CORY FONG, ND TREASURER, KELLY SCHMIDT,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of North Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The plaintiffs won a ruling that fuel taxes on Indians were illegal. and sought refunds for a class (3,000) under *McKesson*. North Dakota passed a new law that required original invoices in an administrative process. Plaintiffs challenged the 2005 law for lack of a hearing. The trial court ruled no hearings were needed, and Indians had to submit original receipts for six years back. In 2007 the court below affirmed, saying refund claimants had to produce original receipts, and the 2005 law applied retroactively to 1997 (nine years back).

Due Process.

1. After taxpayers file a court suit for tax refunds, can a State substitute a new law that requires administrative claims and does not provide for a hearing?

2. Does due process prohibit a State from imposing a new refund law retroactively for a period of nine years?

RULE 29.6 STATEMENT

Petitioner Ken Danks d/b/a TEK Industries has no parent corporation. There is no publicly held corporation that owns 10% or more of petitioners stock. At the time the suit was filed in 2003 Ken Danks was a sole proprietor; later he formed a corporation noted above.

TABLE OF CONTENTS

	Page
Questions Presented	i
Rule 29.6 Statement	ii
Table of Authorities	v
Petition for a Writ of Certiorari	1
Opinions Below	1
Jurisdiction	1
Constitutional Provision and Laws Involved	1
Statement of The Case	2
A. Procedural background	2
B. Factual background	3
REASONS FOR GRANTING THE PETITION	5
I. THE DECISION BELOW CONFLICTS WITH LEADING PRECEDENT	6
A. Due process requires some form of notice and hearing. Contrary to *McKesson* and *Flowers* the opinion below denied refund hearings to Indian claimants	6
B. Under *Flowers* the amount of process due is measured by federal standards, not state law. ND tax laws bar refund hearings to Indian claimants. This scheme lacks the procedural safeguards required by due process	7

TABLE OF CONTENTS – Continued

Page

C. *Reich v. Collins* prohibits a State from substituting a bogus remedy after a taxpayer sues under a general refund law. The court below wrongly substituted a 2005 administrative law, in place of a court suit 10

II. A NINE-YEAR RETROACTIVE USE OF A NEW LAW RAISES AN IMPORTANT FEDERAL QUESTION 12

A. Due process limits retroactive use of a law. The decision below imposed the original invoice law *nine* years back to 1997. National guidelines are needed 12

Conclusion 15

Appendix

ND Supreme Court opinion ..... App. 1

ND District Court ruling on due process issue ..... App. 26

ND Supreme Court order denying petition for rehearing ..... App. 66

Excerpts from appendix in ND Supreme Court:

Motion to declare refund process unlawful .. App. 68

ND letter, notice of denial of refund claim ... App. 74

Gas receipt with price and gallons ..... App. 76

TABLE OF AUTHORITIES

Page

CASES:

Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985) 7, 8, 9

Hibbs v. Winn, 542 U.S. 88 (2004) 12

Jones v. Flowers, 547 U.S. 220 (2006) 6, 7, 8

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 12, 14

Mann v. ND Tax Comm'r, 2007 ND 119, 736 N.W.2d 464 ..... 1, 3

Mann v. ND Tax Comm'r, 2005 ND 36, 692 N.W.2d 490 ..... 2, 11

Matthews v. Eldridge, 424 U.S. 319 (1976) 7

McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990) ..... *passim*

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 8

Newsweek, Inc. v. Florida Dept. of Revenue, 522 U.S. 442 (1998) 10, 11

Reich v. Collins, 513 U.S. 106 (1994) 6, 10, 11, 14

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 12, 14

Service Oil v. State, 479 N.W.2d 815 (ND 1992) 11

Stephenson v. Hoeven, 2007 ND 136, 737 N.W.2d 260 9

United States v. Carlton, 512 U.S. 26 (1994) 12, 13

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES

U.S. Const. amend. XIV, § 1 ..... 1, 6

N.D.C.C. § 57.1-43.1-32 ..... *passim*

N.D.C.C. § 57.1-43.2-20 2

N.D.C.C. § 57-43.1-03.2 ..... *passim*

N.D.C.C. § 57-43.1-04 ..... *passim*

N.D.C.C. § 28-32-21 ..... 8, 9

N.D.C.C. § 57-61-07 9

N.D.C.C. § 57-38-40 9

STATE TAX REGULATIONS

N.D.A.C. 81-01.1-02-01 ..... 2, 8

N.D.A.C. 81-01.1-02-02 ..... 2, 8

PETITION FOR WRIT OF CERTIORARI

The petitioners request this Court review a decision of the North Dakota Supreme Court, and to grant appropriate relief.

OPINIONS BELOW

The opinion below is published at 736 N.W.2d 464 (ND 2007). Pet. App. 1. The trial court's decision denied petitioners' motion for summary judgment is unpublished. App. 26. The court below denied a request for rehearing. App. 66.

JURISDICTION

The ND Supreme Court entered a decision and judgment on July 25, 2007. Petitioners timely filed for rehearing, which was denied on August 22, 2007. App. 66. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AND LAWS INVOLVED

The Fourteenth Amendment to the U.S. Constitution states in relevant part: "[N]or shall any State deprive any person of life, liberty or property without due process of law."

Statutes. A general refund law requires the tax commissioner to pay refunds when a tax is "erroneously or illegally" collected. N.D.C.C. §§ 57-43.1-32 (gas), 57-43.2-20 (diesel). App. 5. A 2005 law allows Native Americans (Indians) to apply for fuel tax refunds for on-Reservation purchases. N.D.C.C. § 57-43.1-03.2. This law incorporated an old law (1997) that requires original receipts be submitted yearly, in an administrative claims process. N.D.C.C. § 54-43.1-04. App. 9.

State tax regulations. N.D.A.C. 81-01.1-02-01, states: "When provided by statute, a taxpayer may request a formal hearing before the tax commissioner." N.D.A.C. 81-01.1-02-02, Taxpayer's right to administrative hearing on refund issue (right to protest and administrative review only when such protest or review is specified by the statutes governing the specific tax type). Absent a right of review, the decision by the tax commissioner is final and irrevocable. *Id.* App. 40.

STATEMENT OF THE CASE

A. Procedural background.

The Indian plaintiffs (claimants or taxpayers) won a ruling that fuel taxes were illegal. The parties appealed, and in *Mann v. ND Tax Comm'r*, 2005 ND 36, 692 N.W.2d 490 the Court upheld the ruling that the state taxes were illegal, and remanded on the class action and refund issues. In 2005 North Dakota

(State or ND) enacted a 2005 law that required original receipts. The taxpayers challenged the 2005 law as it did not comply with due process. App. 38, 68. The trial court ruled the new law was fair; Indians had to file separate claims in an administrative process; and denied a class action. The taxpayers appealed. In *Mann v. ND Tax Comm'r*, 2007 ND 119, 692 N.W.2d 490, the Court affirmed, saying the original invoice law applied back to 1997.

B. Factual background.

ND allows fuel tax funds for businesses (industry and farmers) based on yearly receipts. Tax agents examine the original receipts and pay out in thirty days. App. 5, 10. ND collected the fuel tax from Indians who paid the tax on a Reservation. After the taxpayers won a ruling the fuel taxes on Indians were illegal, they sought refunds under a general refund law. App. 3, 68. The plaintiffs are Joan Mann and Ken Danks, members of the Three Affiliated Tribes (Ft. Berthold Indian Reservation). Tracy Wilkie and Christa Monette are members of the Turtle Mt. Chippewa (T. Mt. Indian Reservation). Lead plaintiff Danks sued on behalf of over 3,000 tribal members (purported class). *Id.*

2005 original invoice law. After the ruling in *Mann I*, ND enacted a new law that allowed Indians to apply for refunds, over on-Reservation purchases. N.D.C.C. 57-43.1-03.2. App. 5. This law incorporated an old law (1997) designed for businesses, based on

original invoices. N.D.C.C. § 54-43.1-04. The old law required a refund claim, and "original invoices or sales ticket proving the purchase of motor vehicle fuel on which the refund is claimed must be attached to the refund form." Other rules are:

> The invoices or sales ticket must include the seller's name and address, the date the fuel was purchased, the type of produce, the number of gallons, the state tax as a separate item or statement that the state tax is included in the price, and the name of the claimant. . . . A certified history of purchases detailing required information may be accepted by the commissioner in lieu of original sale invoices or sales tickets.

App. 46.

The plaintiffs challenged the 2005 law, contending the refund process does not provide for a hearing for presentation of evidence on refund claims, or a chance to contest a refund amount. App. 38, 68. The State deprived plaintiff Danks (and class) of funds: ND takes over $1 million per year from Indians. App. 69. ND attempted to "buy out" lead plaintiff Danks with a partial refund that was rejected as inadequate for him and the purported class. App. 73. ND demands receipts that do not exist. Gas stations do not list the tax "separately stated." ND rejected Tracy Wilkie's $105 refund claim (for year 2005) though she provided receipts and owner's statement (tax included in sale price). ND Letter, App. 74. No notice of hearing was provided. *Id.*

Ruling below. The trial court noted the State tax regulations but rejected the need for a hearing, saying the 2005 law provided a "meaningful opportunity" to secure post-payment relief for taxes already paid. The detailed receipt rules (original invoice, name of seller, type of product, gallons, tax separately stated, name of seller) were "reasonable and not unduly burdensome." App. 41. The trial court ruled the statute of limitations applied six years back and interest had to be paid. App. 52. The trial court ruled the 2005 law applied retroactively. *Id.* In other words, Indian claimants had to produce original receipts from years back, in an administrative scheme.

The ND Supreme Court affirmed, saying the 2005 law complied with due process. A refund claimant "may protest the denial of a refund under rules adopted by the tax commissioner" and can get a hearing. App. 10. The Court affirmed the statute of limitations ruling of six years, and Indians can apply for refund from 1997 to 2005. App. 18. But the Court ruled the 2005 law applied retroactively – Indians had to produce original invoices back from 1997 to apply for a refund. App. 16. The Court noted a "strict use" of the 2005 original invoice law may violate due process. App. 13-14.

REASONS FOR GRANTING THE PETITION

The decision below that denies refund hearings conflicts with leading cases such as *McKesson* that

require a hearing and "clear and certain remedy" in tax refund cases. The taxpayers sued under a general refund law, and North Dakota substituted a new law that required original receipts. The court below recognized ND was on thin ice because it cautioned that the "original invoice" law strictly enforced would violate due process. *Reich v. Collins* prohibits a State from substituting a new law to deny refunds, as ND has done. Review is needed so ND and other States provide an adequate remedy on tax refunds. Finally, the court below imposed an original invoice law nine years back to 1997. This raises an important federal question on how far back a new law can be imposed. The nine-year period exceeds the limits of due process and reason.

I. THE DECISION BELOW CONFLICTS WITH LEADING PRECEDENT.

A. Due process requires some form of notice and hearing. Contrary to *McKesson* and *Flowers* the opinion below denied refund hearings to Indian claimants.

The landmark ruling *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18, 31 (1990) held a State must pay refunds over an illegal tax. Due process requires a "clear and certain remedy" under the Fourteenth Amendment.

> "Because extraction of a tax constitutes deprivation of property, the State must procedural safeguards against unlawful extractions in

> order to satisfy the commands of the Due Process Clause."

Id. 496 U.S. at 36. *McKesson* stated that Florida must provide an adequate post-deprivation remedy (refund suit). *Id. Matthews v. Eldridge*, 424 U.S. 319 (1976) noted some form of hearing is required before an individual is finally deprived of a property interest. *Accord*, *Jones v. Flowers*, 547 U.S. 220 (2006) (proper notice required before property taken). *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540 (1985) (due process requires opportunity for hearing before deprivation of property interest).

The 2005 law does not provide for a hearing or judicial review. It requires original invoices in an administrative scheme. This decision below denying a hearing to Indian claimants is wrong, and conflicts with *McKesson* and related cases: some form of hearing is required on tax refunds. Without a hearing, a claimant cannot present evidence for refunds (mileage logs, federal tax records, etc.).

B. Under *Flowers* the amount of process due is measured by federal standards, not state law. ND tax laws bar refund hearings to Indian claimants. This scheme lacks the procedural safeguards required by due process.

This Court recently emphasized that property can't be taken unless there are adequate procedural safeguards. *See Jones v. Flowers*, 547 U.S. 220 (2006)

(poor notice to owner before his home taken over taxes). Arkansas state law was deficient and the amount of process due is measured by *federal law*. *Id.* Due process requires the government to provide "notice and opportunity for hearing appropriate to the nature of the case," quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *Id.* Due process is measured by federal standards, *Loudermill*, *supra*, 470 U.S. at 542.

The court below ruled that refund claimants "may protest the denial of a refund under rules adopted by the tax commissioner." App. 10. A claimant is entitled to a hearing to contest the denial of his refund claim, citing N.D.C.C. § 28-32-21." *Id.* The protest route leads nowhere.

First, it is undisputed the 2005 law does not provide for a hearing. Next, State tax regulations bar review. N.D.A.C. 81-01.1-02-01 (hearing only when provided by statute). N.D.A.C. 81-01.1-02-02 (right to protest and administrative review only when such protest or review is specified by the statutes governing the specific tax type). Absent a right of review by statute, the decision by the tax commissioner is "final and irrevocable." *Id.* How ND denies hearings. Read together, the State tax laws are used to bar relief. For example, ND denied a refund to claimant Wilkie (tax year 2005). The letter referred to a right to protest and Bill of Rights. App. 74. This is misleading

because the State tax laws *bar* a "right to protest" or hearing.[1]

Error: the decision below wrongly relied on state law. The decision is contrary to *Flowers as federal law* determines the amount of process due. The decision below approved a no-hearing scheme that violates due process, contrary to leading cases such as *McKesson* and *Loudermill*.

While Indians can't get a hearing, others can. *Compare*: Income tax statute. When a refund is denied, a taxpayer can request "formal administrative review . . . by filing a complaint and requesting an administrative hearing." N.D.C.C. § 57-38-40 (13). A taxpayer can appeal a decision rendered by the tax commissioner under chapter 28-32. *Id. Compare*: Coal tax statute. It allows for "hearing to be governed by the provision of chapter 28-32" and one can appeal to district court. N.D.C.C. § 57-61-07.

Ch. 28-32, Administrative Agencies Practice Act, allows an appeal when an adjudication (hearing) is held. N.D.C.C. § 28-32-21 notes a complaint is required to get a hearing. Ch. 28-32 does *not* authorize a refund hearing. *See Stephenson v. Hoeven*, 2007 ND

[1] In the court below ND's counsel argued Indians can protest and get a hearing. This is incorrect. The ND tax website (www.nd.gov/tax/genpubls/bill-of-rights) (2003) refers to a vague right to protest a refund denial. It cites income tax and oil and gas appeals – that by statute provide for a hearing. Compare: Tax Regulation Part 81: no right to protest or hearing unless provided in a statute.

136, 737 N.W.2d 260 (pilot booted out of National Guard could not get court review as no statute authorized an appeal). As the 2005 law does not allow a "protest" or hearing, there is nothing to appeal under Ch. 28-32.

C. *Reich v. Collins* prohibits a State from substituting a bogus remedy after a taxpayer sues under a general refund law. The court below wrongly substituted a 2005 administrative law, in place of a court suit.

Reich v. Collins, 513 U.S. 106 (1994) held a State could not substitute a bogus remedy, when a claimant relied on a general refund law. In *Reich* the claimant sued under a law that allowed for refunds when a tax is ruled "erroneously or illegally" collected. Due process requires an adequate post-deprivation remedy, i.e., a refund suit in court. *Id.* In *Reich* the State argued that no refund suit should be allowed. This Court ruled the "bait and switch" tactic was prohibited. *See McKesson, supra*: clear and certain remedy required over an illegal tax. *Accord*, *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442 (1998). In Newsweek this Court noted that Florida had a practice of permitting taxpayers to seek refunds under a general refund law. *Id.* This Court concluded Newsweek is entitled to a clear and certain remedy, and can use the refund procedures to adjudicate the merits of its claim. The Court granted certiorari, vacated the judgment, and remanded. *Id.*

The court below ruled that Indians must comply with the statutory refund procedure in the 2005 law, N.D.C.C. § 57-43.1 (2005 original receipts law). App. 13. The court below cautioned that a strict use of the original invoice law may be a "bait and switch," in violation of due process. App. 14.

First, ND has a law like the Georgia law in *Reich*; it requires a refund when a tax is "erroneously or illegally" collected. N.D.C.C. § 57-43.1-32 (gas). The plaintiffs sued under this general refund law. *Second*, after the Indians won a ruling the fuel tax was illegal in *Mann I*, ND enacted the 2005 law (original invoices required). *Third*, ND used the new law to deny refunds. ND letter to Tracy Wilkie denying refund as tax not "separately stated," even though she submitted original receipts. App. 68, 75-76. In short, ND wrongly substituted an administrative scheme, in place of a court suit, contrary to *Reich*. Meanwhile, ND has allowed other taxpayers to sue in court. *See Service Oil v. State*, 479 N.W.2d 815 (ND 1992) (additive fuel tax ruled illegal; retroactive refund awarded), citing *McKesson*. It follows that Indian claimants are entitled to sue in court, rather than be put in the "back of the bus."

Under *Reich* and *Newsweek*, certiorari should be granted and the judgment below vacated. If so, then ND has to provide a court hearing in this case. The Indian claimants can then proceed in state court on their quest, since 2003, for tax refunds.

II. A NINE-YEAR RETROACTIVE USE OF A NEW LAW RAISES AN IMPORTANT FEDERAL QUESTION.

A. Due process limits retroactive use of a law. The decision below imposed the original invoice law *nine* years back to 1997. National guidelines are needed.

The test if retroactive application of a tax law violates due process is in two parts. *United States v. Carlton*, 512 U.S. 26 (1994). First, the legislation must have a legitimate purpose furthered by rational means. Second, the period of retroactivity must be modest (citations omitted). Periods longer than one year are likely unlawful. *Id.* at 38 (O'Connor, J., concurring). In *Carlton* the retroactive statute was not arbitrary because it was a curative measure to correct a defect in the original legislation only months earlier.

Due process requires states to provide access to court, or a meaningful opportunity to have claims adjudicated. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (state law contained short time lines to file claims). *Cf. Hibbs v. Winn*, 542 U.S. 88 (2004) (federal court under 42 USC § 1983 over tax credits). The Court noted a state court remedy is adequate only if it provides a *full hearing* and judicial determination, quoting *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 514 (1981).

2005 law. It allowed Indians to file for refunds on fuel taxes and required use of original invoices in an

administrative process. N.D.C.C. § 57-43.1-03.2. It is effective for purchases made after "December 31, 2004." (S.L. 2005, Ch. 40, § 13). A Legislative Note said the Act could not be construed to preclude claims . . . for taxes on purchases "made before January 1, 2006." (House Bill No. 1015).

ND nine-year rule. The court below ruled the 2005 original invoice law applied retroactively: 2005 to 1997 – nine years back. App. 15-16. Though the 2005 law is not effective until "*after* December 31, *2004*" the court said this is not what it means. The court below cited a Legislative Note that said: this Act "may not be construed to preclude claims for motor vehicle . . . refunds by tribal members . . . for taxes on purchases made before January 1, 2005." App. 15-16. The court said the legislature intended to "apply the statutory fuels process, provided in N.D.C.C. ch. 57-43.1, to those claims." The court rejected the plaintiffs argument that the 2005 law does not apply retroactively. The court rejected the argument that the N.D.C.C. 57-43.1-32 (general refund law) applies as the substantive law. *Id.*

Errors. First, applying the ND nine-year rule (back to 1997) is excessive, and violates due process under *Carlton*. The court below failed to apply controlling federal standards on due process, *Flowers, supra*. Second, the 2005 law states it is not effective until "after 2004." The Legislative Note merely states the obvious: ND cannot bar refund claims from before 2005. *See McKesson*: a State must

provide an adequate remedy on refunds. Third, the nine-year rule is contrary to *Logan* because it denies access to court (under the general refund law).

Legislative purpose. There is no legislative history; the 2005 law was enacted at the end of the Legislative Session.[2] Whatever the stated purpose of the 2005 law, the results are harsh: the original invoice rule extends back to 1997, and no hearing allowed. The court below approved a scheme that bars an adequate remedy, contrary to *Rosewell* (requires full hearing and judicial determination).

Remedy. The court below denied a class action, saying separate claims were required, with original receipts from 1997. This ruling bars Indians from suing in a ND state court. This error is compounded because over 3,000 Indian claimants seek refunds. Many Indians lack the means to pursue administrative claims (2005 law). The remedy is to apply leading cases such as *Reich* (state cannot substitute bogus remedy). Under *McKesson* and related cases, the general refund law (N.D.C.C. § 57-43.1-32) should apply in a court suit.

[2] In 2005 lead plaintiff Ken Danks rejected a ND attempt to buy out the class with a partial refund just to him. App. 69. During this time in 2005 ND enacted the original receipt law, as part of a budget and funding bill (S.B. 2080, 2012 and House Bill 1015). In 2005-06 ND had a budget surplus of $500 million.

CONCLUSION

As in *Newsweek* this Court should grant the petition for writ of certiorari and vacate the judgment below. Granting relief will require North Dakota, and other States, to utilize fair tax refund laws.

Respectfully submitted,

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November 2007

736 N.W.2d 464

Supreme Court of North Dakota.
Joan MANN, Ken Danks d/b/a TEK Industries, Tracy Wilkie, Christa Monette, and other persons similarly situated, Plaintiffs and Appellants
v.
NORTH DAKOTA TAX COMMISSIONER, Cory Fong, Defendant and Appellee
and North Dakota Treasurer, Kelly Schmidt, Defendant.
No. 20060366.

July 25, 2007.

Vance Gillette (argued), Minot, ND, for plaintiffs and appellants.

Daniel Lucian Rouse (argued) and Donnita Ann Wald (appeared), Special Assistant Attorneys General, Tax Department, Bismarck, ND; and Robert W. Wirtz (on brief), Special Assistant Attorney General, Bismarck, ND, for defendants and appellee.

VANDE WALLE, Chief Justice.

[¶ 1] Joan Mann, Ken Danks, doing business as TEK Industries, Tracy Wilkie, and Christa Monette ("plaintiffs") appealed from an order denying reconsideration, and from an underlying judgment denying their motion to declare the state fuel tax refund process unlawful, denying their request for class certification, and granting their motion for summary judgment to the extent the court found a six year statute of limitations applies. We conclude the statutory refund process is not unlawful, the district court

did not abuse its discretion in denying class certification, and the court did not abuse its discretion in denying the plaintiffs' request for attorney's fees. We modify the statute of limitations look-back period for the plaintiffs' refund claims, and we affirm the judgment as modified.

I

[¶ 2] The plaintiffs are Native Americans. Mann is a member of the Three Affiliated Tribes, owns Mann Enterprises, and lives on the Fort Berthold Indian Reservation. Danks is also a member of the Three Affiliated Tribes, owns TEK Industries, and lives on the Fort Berthold Indian Reservation. Wilkie and Monette are members of the Turtle Mountain Band of Chippewa Indians and reside on the Turtle Mountain Indian Reservation.

[¶ 3] In August 2003, the plaintiffs sued the State under federal and state law, seeking a declaration that it is illegal for the State to impose a motor vehicle fuel tax under N.D.C.C. ch. 57-43.1 on fuel they purchased on their respective reservations and seeking a refund of the taxes they already paid. They also requested the district court certify the action as a class action. The plaintiffs sought declaratory and injunctive relief, requesting a permanent injunction barring imposition of the motor vehicle fuels tax on their reservations. The State moved to dismiss, arguing the fuels tax could lawfully be imposed and

collected on the reservations under the Hayden-Cartwright Act, 4 U.S.C. § 104.

[¶ 4] In January 2004, the district court rejected the State's argument and declared the fuels tax imposed under N.D.C.C. § 57-43.1-02 was illegally imposed on Native Americans who reside on North Dakota Indian reservations and purchase motor vehicle fuel on reservation lands. The court granted a permanent injunction prohibiting the collection of the illegal fuels tax. The district court dismissed the plaintiffs' federal claims and dismissed, without prejudice, all of the plaintiffs from the action except Danks because he had claimed a refund of taxes paid from the State and had complied with N.D.C.C. § 32-12-03. The court reserved the questions on certification and refunds until a later date.

[¶ 5] The State asked the court to reconsider the order and also sought a stay of the order pending appeal. The plaintiffs also moved for reconsideration challenging the dismissal of the federal claims and the dismissal of all the plaintiffs except Danks. The plaintiffs reinstituted their claims for refunds and for certification of a class action. In April 2004, the district court denied the State's motion for reconsideration, but granted the motion for a stay pending appeal. The court also denied the plaintiffs' motion for reconsideration and postponed determination of refunds and class certification. The court consolidated its rulings into "findings of fact, conclusions of law and order for judgment," but a judgment was not entered.

[¶ 6] The plaintiffs appealed and the State cross-appealed from the various orders. In February 2005, we dismissed the appeals concluding that in the absence of a final judgment we did not have jurisdiction. *Mann v. North Dakota Tax Comm'r*, 2005 ND 36, ¶¶ 13, 19, 692 N.W.2d 490. We also declined to exercise our supervisory authority. *Id.* at ¶ 24. But we said:

> The district court's ruling that the Hayden-Cartwright Act does not authorize imposition of the state motor vehicle fuels tax on Indian reservations is in accord with every federal and state court decision that has addressed the issue. The risk that the district court committed error in its construction of the Hayden-Cartwight (sic) Act is negligible.
>
> The plaintiffs have conceded that the injunction prohibits collection of the motor vehicle fuels tax only from enrolled Native Americans on their own respective Indian reservations. Although the feasibility of enforcing the injunction prohibiting collection of the motor vehicle fuels tax from Native Americans on their own reservations is questionable, the plaintiffs have indicated they would be satisfied if a refund procedure similar to the procedure provided in N.D.C.C. ch. 57-43.1 were made available to them. We urge the Legislature to address this problem.

Id. at ¶¶ 22-23 (citations omitted).

[¶ 7] During the 2005 legislative session, the legislature enacted N.D.C.C. § 57-43.1-03.2, a refund provision, which provides:

> 1. A native American may file a claim with the tax commissioner for a refund of motor vehicle fuel taxes paid by that person under this chapter or special fuel taxes paid under chapter 57-43.2 if the motor vehicle fuel or special fuel was purchased from a retail fuel dealer located on the Indian reservation where the native American is an enrolled member and the fuel was delivered to the native American on that reservation. The refund provisions of this chapter apply to refund claims made under this section.
>
> 2. A fuels tax refund reserve fund is created as a special fund in the state treasury. The tax commissioner shall deposit in that fund such amounts from motor vehicle fuel tax and special fuel tax collections as the attorney general determines necessary to be expended for refunds to which native American government entities may be entitled under qualifying circumstances and conditions determined by the attorney general. There is appropriated as a continuing appropriation out of funds set aside under this subsection so much of the funds as the attorney general determines is necessary to meet the expenditures authorized under this subsection and such funds may be expended for that purpose.

> 2005 N.D. Sess. Laws ch. 40, § 13. Section 57-43.1-03.2, N.D.C.C., by its terms, specifically applies to all qualifying fuel purchases made after December 31, 2004. 2005 N.D. Sess. Laws ch. 40, § 16. The legislature also included a statement of its intent regarding the interpretation of the statute: A new section to Senate Bill No. 2012, as approved by the fifty-ninth legislative assembly, is created and enacted as follows: "LEGISLATIVE INTENT REGARDING INTERPRETATION. Sections 13[, § 57-43.1-03.2,] and 16 [, providing for an effective date,] of this Act may not be construed to preclude claims for motor vehicle and special fuel tax refunds by tribal members or tribal entities for taxes on purchases made before January 1, 2005."

2005 N.D. Sess. Laws ch. 15, § 39.

[¶ 8] In June 2005, the plaintiffs filed an amended motion for summary judgment and class action, questioning whether and how far back the State could be held liable for fuel tax refunds, requesting class certification, and requesting attorney's fees. The plaintiffs also moved to declare the refund process unlawful claiming it violates equal protection and due process.

[¶ 9] The district court denied the plaintiffs' claim that the N.D.C.C. ch. 57-43.1 refund process is unlawful, concluding the process does not violate due process and equal protection because the refund process provides claimants with a meaningful opportunity to secure relief for taxes already paid. The

court granted the plaintiffs' motion for summary judgment to the extent the court found a six-year statute of limitations applies to retrospective applications for refunds and to the extent the court found interest was payable on refunds. The court denied the plaintiffs' request for class certification after deciding a class action was not necessary to ensure a fair and efficient adjudication of the controversy. The court did not take any action on the plaintiffs' request for attorney's fees. The plaintiffs moved for reconsideration arguing the statutory refund process could not be applied retroactively and claiming they were entitled to attorney's fees. The court denied the plaintiffs' motion for reconsideration and the plaintiffs' request for attorney's fees and a final judgment was entered.

II

[¶ 10] The plaintiffs argue the statutory fuel tax refund process contained in N.D.C.C. ch. 57-43.1 violates due process because the refund process does not allow a claimant to request a hearing to challenge a denial. They also argue the refund process is imposed on Native American claimants in a manner that violates equal protection by denying a refund claim unless the claimant provides original receipts with fuel tax listed as a separate item and requiring claims to be for fuel purchased for use in non-licensed equipment.

[¶ 11] The Due Process Clause of the Fourteenth Amendment to the United States Constitution

provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." Payment of a tax constitutes a deprivation of property, and therefore the state must provide either predeprivation or postdeprivation procedural safeguards to satisfy the requirements of the Due Process Clause. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 36, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990); *Service Oil, Inc. v. State,* 479 N.W.2d 815, 821 (N.D.1992). Due process requires a state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation that occurs when a state requires a taxpayer to pay a tax without an opportunity to challenge whether the tax is illegal before payment. *McKesson,* 496 U.S. at 31, 110 S.Ct. 2238. A state has flexibility in responding to a determination that it imposed an unlawful tax, so long as the taxpayer is provided with "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *Id.* at 39-40, 110 S.Ct. 2238.

[¶ 12] The district court found the refund process provides claimants with a meaningful opportunity to secure postdeprivation relief for taxes unlawfully collected and the refund process was reasonable and was not unduly burdensome.

[¶ 13] Native Americans are entitled to a refund of fuel taxes paid under N.D.C.C. chs. 57-43.1 and 57-43.2 if the fuel was purchased from a retail fuel

dealer located on the Indian reservation where the Native American is an enrolled member. N.D.C.C. § 57-43.1-03.2. Native Americans may claim refunds for fuel taxes paid using the procedure set out in N.D.C.C. ch. 57-43.1. N.D.C.C. § 57-43.1-03.2. In order to claim a refund, the claimant must submit a claim on a form provided by the tax commissioner. N.D.C.C. § 57-43.1-04. The claimant must submit the original invoices or sales receipts, which include the seller's name and address, the date the fuel was purchased, the type of product, the number of gallons of fuel purchased, and the name of the claimant. N.D.C.C. § 57-43.1-04. Although N.D.C.C. § 57-43.1-04 requires the fuel not be used in a licensed motor vehicle, when N.D.C.C. § 57-43.1-03.2, which applies to all Native American fuel tax refunds, is read together with N.D.C.C. § 57-43.1-04, the provision of the statute about licensed motor vehicles does not apply to Native American claimants requesting refunds under N.D.C.C. § 57-43.1-03.2. Section 57-43.1-04, N.D.C.C., also requires the claimant provide the original invoice or sales receipt with state tax listed as a separate item, but if that receipt is not available, the claimant must provide a certified statement from the fuel seller stating the receipts include tax in the price. We take judicial notice the 2007 Legislative Assembly amended and reenacted N.D.C.C. § 57-43.1-04 to remove the requirement that tax be listed as a separate item on receipts submitted for refund claims. 2007 N.D. Sess. Laws ch. 538, § 1. The new version of N.D.C.C. § 57-43.1-04 becomes effective on August 1, 2007, and applies to all refund

claims filed after that date. If the claimant no longer has the original receipts he may substitute copies of the receipts if he provides a separate affidavit completed by the fuel seller on a form provided by the tax commissioner, or the claimant may submit a certified history prepared by the fuel seller providing the required details of each fuel purchase. N.D.C.C. § 57-43.1-04. Within thirty days of the receipt of a claim, the tax commissioner must examine the claim and a check will be issued for the amount due unless there are any discrepancies. N.D.C.C. § 57-43.1-07.

[¶ 14] The refund claimant may protest the denial of a refund under rules adopted by the tax commissioner and in the manner provided in N.D.C.C. ch. 28-32. N.D.C.C. § 57-43.1-17(7). The claimant is entitled to a hearing to contest the denial of his refund claim. N.D.C.C. § 28-32-21. The agency must issue a final order. N.D.C.C. § 28-32-39. If the agency's final order denies the refund claim, the claimant may petition for reconsideration or may appeal to the district court. N.D.C.C. §§ 28-32-40 and 28-32-42. The judgment of the district court in an appeal from the agency's order may be reviewed by the Supreme Court on appeal. N.D.C.C. § 28-32-49.

[¶ 15] Native Americans who have been unlawfully deprived of their property by paying fuel taxes under N.D.C.C. chs. 57-43.1 and 57-43.2 are entitled to meaningful backward-looking relief to rectify the unlawful deprivation. *See McKesson,* 496 U.S. at 31, 110 S.Ct. 2238. We conclude the statutory refund process contained in N.D.C.C. ch. 57-43.1 provides

meaningful backward-looking relief with a clear and certain remedy to rectify the unlawful deprivation, and therefore complies with due process requirements.

[¶ 16] Citing *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994), the plaintiffs also claim the State engaged in a "bait and switch" by holding out a "clear and certain" postdeprivation remedy, N.D.C.C. § 57-43.1-32, and then after the taxes are paid declared that no such remedy existed. But this case is different from *Reich*. In *Reich*, a Georgia tax scheme exempting retirement benefits paid by the state from state personal income tax but not exempting retirement benefits paid by the Federal Government was found unconstitutional. *Id.* at 108, 115 S.Ct. 547. Reich sued Georgia in state court seeking a refund based on a Georgia statute which stated a taxpayer was entitled to a refund of all taxes illegally assessed and collected. *Id.* at 109, 115 S.Ct. 547. The Georgia Supreme Court refused to grant a refund after finding the refund statute did not apply, and concluding any predeprivation procedures available were ample safeguard against unlawful deprivations. *Id.* at 109-10, 115 S.Ct. 547. The United States Supreme Court concluded Georgia engaged in a "bait and switch" by holding out what appeared to be a "clear and certain" postdeprivation remedy, the refund statute, and then after the disputed tax was paid declared the remedy did not exist and any predeprivation procedures available to challenge the tax were the exclusive remedy. *Id.* at 111, 115 S.Ct. 547.

The Court remanded for the provision of meaningful backward-looking relief consistent with due process and *McKesson. Id.* at 114, 115 S.Ct. 547.

[¶ 17] A "bait and switch" has not occurred in this case. Taxpayers are entitled to a refund of an illegal or erroneously collected fuels tax under N.D.C.C. § 57-43.1-32, which provides:

> If any taxes, penalties, or interest imposed by this chapter have been erroneously or illegally collected from any person, the commissioner may permit that person to take credit against a subsequent tax return for the amount of the erroneous or illegal overpayment. In the alternative, the commissioner shall present a voucher to the office of management and budget for payment of the amount erroneously or illegally collected and a warrant-check must be prepared by that office drawn on the state treasurer payable to that person. The refund must be paid to the person from undistributed funds received from the tax imposed by this chapter and any credit or refund may not be approved or paid unless it is an amount which is in excess of five dollars.

The State has not argued the plaintiffs are not entitled to a refund, rather the State argues the plaintiffs must comply with the statutory refund procedure set out in N.D.C.C. ch. 57-43.1. As stated above, we conclude the plaintiffs and other Native Americans who purchase fuel on their reservations and pay fuel taxes have been provided with meaningful backward-looking

relief with a clear and certain remedy to obtain refunds of unlawful taxes and prevent any permanent unlawful deprivation of property. But we also caution that an overly strict construction or technical application of the refund requirements in N.D.C.C. § 57-43.1-04 may deprive claimants of a clear and certain postdeprivation remedy resulting in a "bait and switch" and violating due process.

[¶ 18] Moreover, this is the remedy the plaintiffs requested. The plaintiffs' complaint states, "plaintiffs request relief as follows: . . . 3. to require the defendants to set up a speedy refund process which allows documents or oral testimony to establish the amount of fuel purchased or taxes paid; . . . ." When this case was previously argued before this Court, the plaintiffs' attorney was questioned about whether his clients would be satisfied with a statutory refund process and he said they would. In *Mann*, 2005 ND 36, ¶ 23, 692 N.W.2d 490, we said, "[a]lthough the feasibility of enforcing the injunction prohibiting collection of the motor vehicle fuels tax from Native Americans on their own reservations is questionable, the plaintiffs have indicated they would be satisfied if a refund procedure similar to the procedure provided in N.D.C.C. ch. 57-43.1 were made available to them." The plaintiffs requested a statutory refund provision, similar to that provided in N.D.C.C. ch. 57-43.1. They received the remedy they requested, and we conclude that remedy does not violate due process.

[¶ 19] The plaintiffs also claim the refund process violates their equal protection rights because refunds are only allowed for fuel used in non-licensed vehicles and claims are denied unless the original receipts list tax as a separate item. The plaintiffs claim receipts with tax as a separate item do not exist, and most Native American's refund claims are for fuel used in a licensed vehicle.

[¶ 20] As we said in our discussion of the due process issue, we have taken judicial notice of the amendment to N.D.C.C. § 57-43.1-04, removing the requirement that receipts for fuel purchases list tax as a separate item. Although that amendment does not become effective until August 1, 2007, N.D.C.C. § 57-43.1-04 already provides that a claimant may submit a certified statement from the fuel seller stating the receipts include tax in the price. As for the plaintiffs' claims that Native Americans are not allowed refunds on fuel purchased for use in a licensed vehicle, when N.D.C.C. § 57-43.1-03.2, which applies to all Native American fuel refunds, is read together with N.D.C.C. § 57-43.1-04, it is clear the requirement that the purchased fuel must be used in a non-licensed vehicle does not apply to Native Americans seeking refunds under N.D.C.C. § 57-43.1-03.2. We conclude the statutory refund process does not violate the plaintiffs' equal protection rights.

[¶ 21] We affirm the district court's decision finding the statutory refund process is lawful, complies with due process requirements, and does not violate the plaintiffs' equal protection rights.

III

[¶ 22] The plaintiffs argue N.D.C.C. § 57-43.1-03.2, the Native American fuels tax refund provision, does not apply retroactively to claims for refunds of taxes paid prior to January 1, 2005, the effective date of the statute. They claim the language of the statute is clear, the statutory refund process only applies to fuel tax paid after January 1, 2005, and that N.D.C.C. § 57-43.1-32, the provision for erroneously or illegally collected taxes, applies.

[¶ 23] The district court addressed the retroactivity of the Native American fuel tax refund statute, N.D.C.C. § 57-43.1-03.2, and said:

> Given the Supreme Court's directive (in *Mann v. ND Tax Commissioner*) to the North Dakota Legislature, and bearing in mind what is set forth in the *Note* to newly-enacted N.D.C.C. 57-43.1-03.2, it appears that the Legislature intended to allow enrolled tribal members/tribal entities to obtain tax refunds for motor vehicle fuel purchases made *prior to the effective date of the statute.*

(Emphasis in the original). The court found the statutory refund process, contained in N.D.C.C. ch. 57-43.1, applies to all claims for fuel tax refunds by Native Americans, including refund claims for taxes paid before 2005. We agree.

[¶ 24] "'A statute is employed retroactively when it is applied to a cause of action that arose prior

to the effective date of the statute.'" *Smith v. Baumgartner*, 2003 ND 120, ¶ 11, 665 N.W.2d 12 (quoting *State v. Cummings*, 386 N.W.2d 468, 471 (N.D.1986)). Generally, statutes are not applied retroactively unless we can rationally infer the legislature intended retroactive application of the statute. *Smith*, at ¶ 14.

[¶ 25] In this case the legislature's intent is clear, the note following the statute states, "'LEGISLATIVE INTENT REGARDING INTERPRETATION. [Section 57-43.1-03.2 and the effective date] of this Act may not be construed to preclude claims for motor vehicle and special fuel tax refunds by tribal members or tribal entities for taxes on purchases made before January 1, 2005.'" N.D.C.C. § 57-43.1-03.2. The legislature intended Native Americans to be able to claim refunds for all fuel taxes paid, including those paid before January 1, 2005, and to apply the statutory fuel tax refund process, provided in N.D.C.C. ch. 57-43.1, to those claims.

[¶ 26] The plaintiffs also asked the district court to decide what the statute of limitations was for refund claims. The State argued N.D.C.C. § 57-43.1-05 provides a specific statute of limitations for fuel tax refund claims, and states, "[a] refund claim must be filed, for all motor vehicle fuel purchases during a calendar year, on or after January first and before July first of the next year following the year during which the purchase was made, or the claim for refund is barred unless the commissioner grants an extension of time for cause." The court considered the

relevant statutes and found the legislature intended to allow enrolled tribal members to obtain tax refunds for motor vehicle fuel purchases made prior to January 1, 2005, but concluded the legislative intent on how far back to allow claims was not clear. The court found a general six-year statute of limitations governing contract actions applies, under N.D.C.C. § 28-01-16(1), and Native Americans may claim refunds for taxes paid six years prior to January 1, 2005, the effective date of the statute allowing refunds.

[¶ 27] The State argues the district court erred in finding Native Americans could request refunds for six years prior to the enactment of the statute under a contract-theory-based statute of limitations, because there are specific statutes of limitations set out in N.D.C.C. §§ 57-43.1-05 and 57-01-19 barring claims filed by individual Native Americans for all time periods prior to those specifically provided. Section 57-01-19, N.D.C.C., also enacted in 2005, provides:

> Notwithstanding any provision relating to claims for refund or credit of state taxes paid contained in title 57, any claim for a refund or credit of taxes paid based upon a claim that the tax or any provision thereof is unconstitutional under the federal or state constitution must be made within one hundred eighty days of the due date of the return or payment of the tax, whichever occurs first, for which the refund or credit is claimed. A claim for refund or credit of taxes paid before January 1, 2005, based upon a claim that the

> tax or any provision thereof is unconstitutional that is not filed with the commissioner before July 1, 2005, must be denied. This section does not apply to ad valorem property taxes.

But the State did not cross-appeal, and therefore it cannot challenge the court's findings and seek a more favorable result than it received from the district court. *See McCollum v. North Dakota Workers Comp. Bureau,* 1997 ND 163, ¶ 4 n. 3, 567 N.W.2d 811.

[¶ 28] The plaintiffs argue the court erred in finding the six-year statute of limitations restricted refunds to taxes paid on or after January 1, 1999. They claim the statute of limitations was tolled upon the commencement of the action, and therefore the look-back period begins six years from the date the suit was filed, September 22, 2003.

[¶ 29] A statute of limitations tolls while a suit is pending, including through the appeal. *See* N.D.C.C. § 28-05-10; *Finch v. Backes,* 491 N.W.2d 705, 707 (N.D.1992). The district court found the plaintiffs are entitled to a six-year look-back period to obtain fuel tax refunds, and we conclude the look-back period starts six years from when the suit was commenced. We therefore conclude the plaintiffs are entitled to refunds for fuel taxes paid after September 21, 1997, and we direct the judgment be modified accordingly.

IV

[¶ 30] The plaintiffs argue the requirements to certify a class action under N.D.R.Civ.P. 23 were met and the district court erred in denying class certification. They claim the court erred in finding a class action was not necessary because the statutory refund process applies to claims for refunds of taxes paid prior to 2005 and is more appropriate to adjudicate Native Americans' claims for refunds.

[¶ 31] The district court has broad discretion in deciding whether to certify a class action under N.D.R.Civ.P. 23, and that decision will not be reversed on appeal unless the court abused its discretion. *Werlinger v. Champion Healthcare Corp.*, 1999 ND 173, ¶ 6, 598 N.W.2d 820. A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law. *Id.*

[¶ 32] Four requirements must be met in order to certify a class action under N.D.R.Civ.P. 23:

> 1. The class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable;
>
> 2. There is a question of law or fact common to the class;
>
> 3. A class action should be permitted for the fair and efficient adjudication of the controversy; and

> 4. The representative parties fairly and adequately will protect the interests of the class.

Werlinger, 1999 ND 173, ¶ 8, 598 N.W.2d 820.

[¶ 33] If the court finds the first two requirements have been met, it must decide whether a class action should be permitted for a fair and efficient adjudication of the controversy, and in doing so N.D.R.Civ.P. 23(c) lists thirteen factors for the court to consider. *Werlinger,* 1999 ND 173, ¶ 26, 598 N.W.2d 820. The factors will either weigh in favor or against certification. *Id.* The district court has broad discretion in weighing the factors and deciding whether a class action will provide a fair and efficient adjudication of the controversy. *Howe v. Microsoft Corp.,* 2003 ND 12, ¶ 9, 656 N.W.2d 285.

[¶ 34] The district court found the first and second requirements to certify a class action were arguably met, finding the class was sufficiently numerous and there was a common question of law or fact. In deciding whether a class action should be permitted for a fair and efficient adjudication of the controversy, the court considered the thirteen factors in N.D.R.Civ.P. 23(c), and said:

> The Court finds that other means of adjudicating the claims and defenses are *not* impracticable or inefficient. In fact, because the very nature of the refund process dictates that each refund claimant prove his/her entitlement to a refund with information that only he/she possesses, other means (than a

> class action) of adjudicating the claims and defenses are *more* practical and efficient here.
>
> . . . .
>
> It has already been judicially determined that imposition of the State's fuel tax in connection with on-reservation purchases of motor fuel by enrolled Native Americans is illegal. With this threshold determination having been made, those persons seeking refunds of taxes already paid should logically be required to resort to the refund process specifically designed by the Legislature in response to *Mann v. N.D. Tax Commissioner*, 2005 ND 36, 692 N.W.2d 490.
>
> . . . .
>
> Recognizing that the Legislature has now provided enrolled Native Americans with what appears to be a very straightforward, relatively uncomplicated, method of making claims for refunds of fuel taxes erroneously paid, refund claimants should be able to process their individual claims with minimal difficulty-outside the court system.

(Emphasis in original). The court concluded a class action was not necessary for a fair and efficient adjudication of the controversy. The court found the members of the class have other means of adjudicating their claims, specifically the statutory refund process, and a class action was not the most appropriate means.

[¶ 35] We agree. The fuel tax has already been declared unlawful as applied to Native Americans who purchase fuel on the reservation they are a member of, and therefore the only part of the controversy left to resolve is how to refund the unlawfully collected taxes. Whether a class action is certified or individual claimants are required to file claims for refunds, the claimants must prove their individual damages. The legislature has provided a statutory refund process to allow individual claimants to get refunds. We have said this remedy is sufficient because it provides meaningful backward-looking relief with a clear and certain remedy to rectify any unlawful deprivation that has occurred. The plaintiffs claim a class action is necessary for the fair and efficient adjudication of the controversy because the district court erred in finding the statutory refund process applies to claims for refunds of taxes paid prior to 2005, but we have already addressed this argument and held the statutory refund process applies to all Native American claims for fuel tax refunds, including claims for taxes paid prior to 2005. When the only remaining controversy is the remedy to be imposed and parties can obtain the same relief without class certification, then a class action may not be necessary for a fair and efficient adjudication. *See State v. Buckley Powder Co.*, 945 P.2d 841, 848 (Colo.1997) (an adequate refund program is certainly relevant to a court's class certification decision when the only remaining controversy is the remedy to be imposed); *Buckley Powder Co. v. State*, 70 P.3d 547, 554-55 (Colo.Ct.App.2002) (affirming trial court's decision to

grant class certification because refund program was not adequate). Because the statutory refund process applies to all Native American claims for fuel tax refunds and we have held the refund process is an adequate remedy, the statutory refund process is the more appropriate means to adjudicate refund claims.

[¶ 36] We conclude the district court did not abuse its discretion in denying class certification and finding a class action is not necessary for the fair and efficient adjudication of the controversy.

V

[¶ 37] The plaintiffs also claim they are entitled to an award of attorney's fees under the common fund doctrine, and they argue the district court erred in denying their request.

[¶ 38] North Dakota applies the American rule that every litigant is responsible for his own attorney's fees, and therefore successful litigants are not entitled to recover attorney's fees unless authorized by statute or contract. *Deacon's Development, LLP v. Lamb*, 2006 ND 172, ¶ 11, 719 N.W.2d 379. The common fund doctrine is a recognized exception to the general principle that every litigant should bear his own attorney's fees, and the doctrine provides that a litigant who recovers a common fund for the benefit of others is entitled to reasonable attorney's fees from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). *The purpose of the common fund doctrine is to spread*

out the attorney's fees proportionately among those who benefit from the suit, recognizing "that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Id.* The common fund doctrine is consistent with the American rule because the expense is spread out among those who benefit from the suit rather than requiring the losing party to pay the cost of the litigation. *Id.* at 481, 100 S.Ct. 745.

[¶ 39] The district court concluded the common fund doctrine did not apply because:

> 1. The responsibility for paying any attorney's fees awarded by the Court will not be shared by all who benefit from the litigation. 2. Because each fuel tax refund claimant who qualifies for a refund will be paid the *full amount* to which he/she can prove he/she is entitled, plus interest, no portion of any recovery will be used to pay attorney's fees. 3. Any attorney's fees awarded by the Court will be paid by the State, not by those who will benefit from the litigation efforts of Plaintiffs' counsel.

The court denied the plaintiffs' request for attorney's fees.

[¶ 40] We conclude there is no statutory basis to award attorney's fees and the common fund doctrine does not apply. The purpose of the common fund doctrine would not be fulfilled in this case because the costs of the litigation would not be spread out equally among those who will benefit from the litigation,

rather the attorney's fees awarded would be paid by the State. We affirm the denial of attorney's fees.

VI

[¶ 41] We affirm the district court's judgment denying the plaintiffs' request for class certification, and denying their motion to declare the statutory refund process unlawful. We modify the statute of limitations look-back period for the plaintiffs' refund claims, we dissolve the permanent injunction, and we affirm the judgment as modified.

[¶ 42] DALE V. SANDSTROM, DANIEL J. CROTHERS, MARY MUEHLEN MARING and CAROL RONNING KAPSNER, JJ., concur.

STATE OF NORTH DAKOTA	**IN DISTRICT COURT**
COUNTY OF MOUNTRAIL	**NORTHWEST JUDICIAL DISTRICT**
Joan Mann; Ken Danks, d/b/a TEK Industries; Tracy Wilkie; Christa Monette; and, other persons similarly situated, Plaintiffs, v. North Dakota Tax Commissioner, Defendant.	**MEMORANDUM AND ORDER** **Case No. 2003-C-0085**

INTRODUCTION

The Plaintiffs in this case are all Native Americans. Joan Mann ("Mann") is an enrolled member of the Three Affiliated Tribes, owns Mann Enterprises and lives on the Fort Berthold Indian Reservation. Ken Danks ("Danks") is also an enrolled member of the Three Affiliated Tribes, owns TEK Industries and lives on the same reservation. Tracy Wilkie ("Wilkie") and Christa Monette ("Monette") are both enrolled members of the Turtle Mountain Band of Chippewa Indians, and both reside on the Turtle Mountain Indian Reservation.

In August of 2003, the Plaintiffs brought an action against the State of North Dakota ("the

State"), under both state and federal law, asking the Court to declare that it is illegal for the State to impose and collect the twenty-one cent (21¢) motor vehicle fuels tax (hereafter, "fuels tax" or "fuel taxes") authorized by N.D.C.C. Ch. 57-43.1 on fuel purchased by them on their respective reservations. As part of their prayer for relief, the Plaintiffs also sought a refund of the fuel taxes they had already paid. In addition, the Plaintiffs asked the Court to certify their lawsuit as a class action.

The State moved to dismiss the Plaintiffs' action, alleging insufficient service of process and lack of compliance with the notice-of-claim provision found at N.D.C.C. 32-12.2-04. The Plaintiffs responded by moving for declaratory and injunctive relief, asking the Court to issue a permanent injunction barring imposition of the fuels tax on their respective reservations. The State countered with the argument that the fuels tax *could* lawfully be imposed and collected on the Plaintiffs' reservations in accordance with the Hayden-Cartwright Act, 4 U.S.C. § 104.

On January 12, 2004, the Court (Hon. Gary A. Holum, District Judge) issued a Memorandum Opinion and Order, in which the Court *rejected* the State's argument that imposition and collection of the fuels tax on the Plaintiffs' reservations was authorized by the Hayden-Cartwright Act. The Court specifically ruled that, "[a]s a matter of law, the motor fuels tax imposed pursuant to N.D.C.C. § 57-43.1-02 is declared by the Court to be illegally imposed on Native Americans who reside on North Dakota Indian

reservations and purchase motor fuel on reservation lands." The Court also issued a permanent injunction prohibiting "collection of the illegal motor fuels tax."

As part of its Memorandum Opinion and Order, the Court dismissed the Plaintiffs' federal claims, and, with the exception of Danks, dismissed (without prejudice) the remaining Plaintiffs from the action. Danks was left in because he had asked the State for a refund of taxes paid, and was "the only Plaintiff who has complied with N.D.C.C. § 32-12-03." The Court declined to rule on the questions of class certification and refunds, leaving these matters to be resolved at a later date.

On January 23, 2004, the State asked the Court to "reconsider" its January 12, 2004, decision, claiming that it was "denied the opportunity to file an Answer to the Original Complaint" and was "not given an opportunity to address the merits of their case before the Court." In addition, the State sought a stay of the Court's Memorandum Opinion and Order pending appeal.

On January 27, 2004, the Plaintiffs countered by filing their own "motion for reconsideration," wherein they challenged the Court's decisions to dismiss their federal claims and to dismiss all of the Plaintiffs, other than Danks, from the lawsuit. The Plaintiffs also reinstituted their claims for class certification and refunds.

On April 29, 2004, the Court denied the State's motion for reconsideration, but granted its request for

a stay pending appeal. The Court also denied the Plaintiffs' motion for reconsideration, and announced that it would hold any ruling on the questions of class certification and refunds in abeyance.

The Court consolidated its various rulings into "findings of fact, conclusions of law and order for judgment" dated April 29, 2004 (filed May 7, 2004). While this document stated, "LET JUDGMENT BE ENTERED ACCORDINGLY," no actual Judgment was entered.

The Plaintiffs appealed to the North Dakota Supreme Court from the April 29, 2004, Order denying their motion for reconsideration, and from the January 12, 2004, Memorandum Opinion and Order dismissing all of the Plaintiffs, other than Danks, from the lawsuit. The State cross-appealed from the April 29, 2004, Order denying its motion for reconsideration, and from that portion of the Order declaring the fuels tax to have been illegally imposed.

The North Dakota Supreme Court issued its decision in this matter on February 16, 2005, in *Mann v. ND. Tax Commissioner,* 2005 ND 36, 692 N.W.2d 490. Our high court ruled as follows:

1. The State appealed from: (a) that portion of the trial court's April 29, 2004, Order declaring the imposition of the fuels tax on fuel purchased on the Plaintiffs' reservations illegal; and, (b) that portion of the April 29,2004, Order denying its motion for reconsideration of the

January 12, 2004, Memorandum Opinion and Order wherein the Court issued a permanent injunction against imposition and collection of the tax.

(a) Because an "order for judgment" is not an appealable order under N.D.C.C. 28-27-02, and no actual Judgment was entered pursuant to the trial court's "order for judgment," the State's appeal from that portion of the trial court's April 29, 2004, Order declaring the imposition of the fuels tax on fuel purchased on the Plaintiffs' reservations illegal is *dismissed.*

(b) Because the Court did not certify its Order denying the State's motion for reconsideration as being final under Rule 54(b) of the North Dakota Rules of Civil Procedure, and, even if it had done so such certification would have been improvidently granted, no jurisdiction exists (in the Supreme Court) to consider the State's appeal from this portion of the April 29, 2004, Order – and the appeal is *dismissed.*

2. The Plaintiffs appealed from: (a) that portion of the trial court's January 12, 2004, Memorandum Opinion and Order wherein the trial court issued a permanent injunction against the imposition of the fuels tax on fuel purchased on the

Plaintiffs' reservations; (b) that portion of the January 12, 2004, Memorandum Opinion and Order wherein the trial court dismissed all of the Plaintiffs, with the exception of Danks, from this lawsuit; and, (c) that portion of the trial court's April 29, 2004, Order denying the Plaintiffs' motion for reconsideration.

(a) Because a close review of the January 12, 2004, Memorandum Opinion and Order issued by the trial court reveals that the Court did not intend this decision to be its *final order,* the Plaintiffs have attempted to appeal from an interlocutory memorandum opinion and order – and memorandum opinions are not appealable.

Even if the January 12, 2004, Order *was* intended to be the trial court's *final order,* compliance with N.D.R.Civ.P. 54(b) would be required because unadjudicated claims for refunds and for class action certification are still pending in the district court. "The dismissal, without prejudice, of all plaintiffs except Danks does not present the 'infrequent harsh case' warranting the extraordinary remedy of an otherwise interlocutory appeal."

(b) The trial court's dismissal of all of the Plaintiffs, with the exception of

Danks, from this lawsuit, was specifically stated to be "without prejudice." A dismissal "without prejudice" is ordinarily not final and appealable unless it has the practical effect of terminating the litigation in the plaintiff's chosen forum or the plaintiff will be barred by the statute of limitations from bringing another action. In the case before the Court, this dismissal without prejudice would neither terminate the litigation in state court nor necessarily bar the action and claim for refunds under the statute of limitations.

(c) The Plaintiffs' attempted appeal from that portion of the trial court's April 29, 2004, Order denying their motion for reconsideration fails for the same reason the State's attempted appeal from that Order is defective. "Assuming N.D.R.Civ.P. 54(b) certification had been granted, there are no unusual or compelling circumstances for authorizing an immediate appeal from an order denying reconsideration of a prior interlocutory order dismissing some of the plaintiffs from the action without prejudice."

3. The Supreme Court will not exercise its supervisory authority to examine the trial court's decisions: (a) dismissing (without prejudice) all of the Plaintiffs,

other than Danks, from this action; or, (b) ruling that the Hayden-Cartwright Act, 4 U.S.C. § 104, does not authorize imposition of the fuels tax on fuel purchased by Native Americans on their respective reservations.

(a) "Because the plaintiffs may either bring another action, or, if not, appeal from a properly entered final judgment, adequate alternative remedies exist to resolve the disputed dismissals."

(b) "One of the factors we (i.e., the Supreme Court) consider in deciding whether to exercise our discretion and grant a supervisory writ is whether the district court has committed an error. (citations omitted). The State concedes that, but for the Hayden-Cartwright Act, it could not collect the motor vehicle fuels tax from enrolled members of the Indian reservations at issue. *See: Oklahoma Tax Comm'n. v. Chickasaw Nation,* 515 U.S. 450, 459 (1995) ("If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization"). The district court's ruling that the Hayden-Cartwright Act does not authorize imposition of the state motor vehicle fuels tax on Indian reservations is in

accord with every federal and state court decision that has addressed the issue. (citations omitted). The risk that the district court committed error in its construction of the Hayden-Cartwright Act is negligible."

4. "The Plaintiffs have conceded that the injunction prohibits collection of the motor vehicle fuels tax only from enrolled Native Americans on their own respective Indian reservations. Although the feasibility of enforcing the injunction prohibiting collection of the motor vehicle fuels tax from Native Americans on their own reservations is questionable, the plaintiffs have indicated they would be satisfied if a refund procedure similar to the procedure provided in N.D.C.C. ch. 57-43.1 were made available to them. We urge the Legislature to address this problem."

5. "We decline to exercise our supervisory jurisdiction in this case."

6. "The appeals are dismissed."

In response to the urging of the North Dakota Supreme Court, the North Dakota Legislature enacted N.D.C.C. 57-01-19 and 57-43.1-03.2.

N.D.C.C. 57-01-19, **Claim of unconstitutionality - Refund or credit of taxes paid,** reads as follows:

Notwithstanding any provision relating to claims for refund or credit of state taxes paid contained in title 57, any claim for a refund or credit of taxes paid based upon a claim that the tax or any provision thereof is unconstitutional under the federal or state constitution must be made within one hundred eighty days of the due date of the return or payment of the tax, whichever occurs first, for which the refund or credit is claimed. A claim for refund or credit of taxes paid before January 1, 2005, based upon a claim that the tax or any provision thereof is unconstitutional that is not filed with the commissioner before July 1, 2005, must be denied. This section does not apply to ad valorem property taxes.

N.D.C.C. 57-43.1-03.2, **Refund of tax for fuel purchased by native Americans - Fuels tax refund reserve fund - Continuing appropriation,** reads as follows:

1. A native American may file a claim with the tax commissioner for a refund of motor vehicle fuel taxes paid by that person under this chapter or special fuel taxes paid under chapter 57-43.2 if the motor vehicle fuel or special fuel was purchased from a retail fuel dealer located on the Indian reservation where the native American is an enrolled member and the fuel was delivered to the native American on that reservation. The refund provisions of this chapter apply to refund claims made under this section.

> 2. A fuels tax refund reserve fund is created as a special fund in the state treasury. The tax commissioner shall deposit in that fund such amounts from motor vehicle fuel tax and special fuel tax collections as the attorney general determines necessary to be expended fo [sic] refunds to which native American government entities may be entitled under qualifying circumstances and conditions determined by the attorney general. There is appropriated as a continuing appropriation out of funds set aside under this subsection so much of the funds as the attorney general determines is necessary to meet the expenditures authorized under this subsection and such funds may be expended for that purpose.

In June of 2005, the Plaintiffs filed with the Court Plaintiffs' Amended Motion for Summary Judgment & Class Action. In submitting this motion to the Court, the Plaintiffs are seeking answers to the following questions:

> "1. Is the state liable for refunds to the Indian plaintiffs;
>
> 2. How far back is the state liable for refunds;
>
> 3. Should the class be certified as is, or does a new state law that requires filing of claims by June 30, 2005 (when tax ruled illegal) require 4,000 separate refund claims to be filed;

4. Is plaintiffs' counsel entitled to fees on a per basis (of common fund) under Rule 23."

The Plaintiffs also filed with the Court, in June of2005, Plaintiff's Motion to Declare Refund Process Unlawful.

Oral argument on the Plaintiffs' motions took place on Monday, June 13, 2005, beginning at 1:35 p.m., C.D.T., in Courtroom 302, at the Ward County Courthouse, Minot, North Dakota. Mr. Vance Gillette, Attorney at Law, Minot, North Dakota, argued the motions in behalf of the Plaintiffs, while Mr. Daniel L. Rouse, Special Assistant Attorney General, Bismarck, North Dakota, argued for the State.

The Court's analysis of the pending motions is as follows:

1. Plaintiffs' Motion to Declare Refund Process Unlawful

PLAINTIFFS' POSITION

The Plaintiffs argue that the refund process set out at N.D.C.C. 57-43.1-04 violates due process and equal protection.

On *due process* grounds, the Plaintiffs point out that N.D.C.C. 57-43.1-04 allows refunds to be given based upon actual receipts, certified history, or copy and affidavit, but no other proof, and that the statute limits refunds to farmers and industry. *Plaintiffs' Motion to Declare Refund Process Unlawful*, ¶ 2. The

Plaintiffs also complain that "the refund process does not provide for a hearing or allow presentation of evidence on fuel tax refund claims" or "the chance to contest a refund amount." *Id.* at ¶¶ 2,9.

The Plaintiffs also cite the Court to *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, fn. 22, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) in support of their due process argument. This opinion reads, in pertinent part, as follows:

> "To satisfy the requirement of the Due Process Clause, therefore, in this refund action the State must provide the taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, n22, but also a 'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one."
>
> "n22 See n.17 . . . see also e.g., *Matthews,* 424 U.S., at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'") (citation omitted). The adequacy of this aspect of Florida's postdeprivation procedure is not in dispute."
>
> "n17 See, e.g., *Matthews v. Eldridge,* 424 U.S. 319, 333 (1976) ("This Court has consistently held that some form of hearing is required before an individual is finally deprived of a property interest") . . . "

On *equal protection* grounds, the Plaintiffs cite *NL Industries v. ND Tax Comm.*, 498 N.W.2d 141 (N.D.1993), taking issue with a procedure which they say denies refund hearings to some Indians, while allowing others a full evidentiary hearing. *NL Industries* is a case which dealt with a determination made by the North Dakota State Tax Commissioner concerning income taxes paid by NL Industries. In reviewing the North Dakota Supreme Court's opinion in this case, it appears that NL Industries filed a complaint contesting the denial of refund claims made by the company, as well as the assessment of additional taxes, and that an administrative hearing was held concerning the complaint. 498 N.W.2d at 142. However, other than the fact that an administrative hearing was held on the Plaintiffs' complaint, there was no discussion (by the Supreme Court) of the refund process itself which would support the Plaintiffs' equal protection argument in this case.

The Plaintiffs assert that "the state lacks a compelling interest to justify the discriminatory treatment." *Plaintiffs' Brief in Support of Motion to Declare Refund Process Unlawful*, p.5. The Plaintiffs also cite N.D.A.C. 81-01.1-02-01 in support of their claim that the refund process is constitutionally infirm, noting that "the right to administrative review is available only when it is specifically provided by statute. Absent this, the decision of the tax commissioner is final"

N.D.A.C. 81-01.1-02-01, **Formal hearing before tax commissioner,** reads as follows:

> When provided by statute, a taxpayer may request a formal hearing before the tax commissioner.

N.D.A.C. 81-01.1-02-02, **Taxpayer's right to administrative hearing on refund issue,** reads as follows:

> If the tax commissioner denies any portion of a taxpayer's request for a refund, the taxpayer has the right to protest and the right to administrative review only when such protest or review is specifically provided by the statutes governing the specific tax type. When there is no specific statutory provision giving a taxpayer the right of administrative review, the decision by the tax commissioner is final and irrevocable."

THE STATE'S POSITION

The State's argument on the Plaintiffs' Motion to Declare Refund Process Unlawful is somewhat lacking.

The State asserts that allowing the Plaintiffs to prove their entitlement to refunds by means other than those set forth in the statute "would simply increase the burden on both the individual native American fuel tax refund claimant, as well as the Tax Commissioner in the processing, verification, and administration of those claims." *Brief of the State of*

North Dakota in Reply to the Issue of Refunds and Class Action and Applicable Motions, p.6.

The Court believes that the more persuasive argument advanced by the State is that the refund process provided by N.D.C.C. 57-43.1-04 "allows the Tax Commissioner a fair opportunity to ensure that the claims are legitimate, proven, and should be paid." *Id.*

THE COURT'S ANALYSIS

The dispositive question in terms of this motion is whether the refund process found at N.D.C.C. 57-43.1-04 provides claimants – including Native Americans who pay fuel taxes on fuel purchased on their respective reservations – with a *meaningful opportunity* to secure post-payment relief for taxes already paid pursuant to a tax scheme ultimately found to be unconstitutional.

This is in line with what the United States Supreme Court stated in *McKesson, supra*:

> "Our precedents establish that if a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional."

The Court finds that the refund process provided by North Dakota law (N.D.C.C. 57-43.1-04) *does* in fact provide claimants – including Native Americans who pay fuel taxes on fuel purchased on their respective reservations – with a *meaningful opportunity* to secure post payment relief for taxes already paid. The requirements that a refund claimant produce actual receipts or sales tickets (or copies of the same, or a certified history of purchases), including: (a) the seller's name and address; (b) the date the fuel was purchased; (c) the type of product; (d) the number of gallons of fuel purchased; (e) the state tax as a separate item(or a statement that the state tax is included in the price of the fuel); and, (f) the name of the claimant, are *reasonable* and *not unduly burdensome* requirements which the State may impose upon refund claimants in order to satisfy the State that fuel purchases were made by enrolled members of recognized Indian tribes on reservation lands.

Addressing somewhat of a "side issue" raised by the Plaintiffs, the Court further finds that, in light of the enactment of N.D.C.C. 57-43.1-03.2, the "other than a licensed motor vehicle" limitation found at N.D.C.C. 57-43.1-04 does *not* apply to refund claims made by Native Americans who have purchased fuel on reservation lands.

2. ***Plaintiffs' Amended Motion for Summary Judgment & Class Relief***

ISSUES

I. With a judicial determination having been made that the State may not impose its fuels tax on fuel purchases made by Native Americans on their respective reservations, are the Plaintiffs in this case entitled to refunds of taxes already paid under N.D.C.C. 57-43.1-32?

II. Should the Court grant class certification to "enrolled members who reside on an Indian Reservation, and paid the state fuel tax on a Reservation in ND?" *Plaintiffs' Supplemental Brief,* p.3.

III. Are successful refund claimants entitled to interest on their refund amounts?

IV. Should the Court approve the fee agreement which the Plaintiffs' counsel has with his clients?

I.

A summary of the applicable statutes is helpful at the outset of this discussion. N.D.C.C. 57-43.1-32, **Erroneously or illegally collected taxes,** provides, in pertinent part, as follows:

> If any taxes, penalties, or interest imposed by this chapter have been erroneously or illegally collected from any person, the commissioner may permit that person to take

> credit against a subsequent tax return for the amount of the erroneous or illegal overpayment. In the alternative, the commissioner shall present a voucher to the office of management and budget for payment of the amount erroneously or illegally collected and a warrant-check must be prepared by that office drawn on the state treasurer payable to that person.

The foregoing statute cannot be read in isolation, but must be read in conjunction with several other statutes.

In 2005, the North Dakota Legislature enacted N.D.C.C. 57-43.1-03.2, **Refund of tax for fuel purchased by native Americans - Fuels tax refund reserve fund - Continuing appropriation,** which provides, in pertinent part, as follows:

> 1. A native American may file a claim with the tax commissioner for a refund of motor vehicle fuel taxes paid by that person under this chapter or special fuel taxes paid under chapter 57-43.2 if the motor vehicle fuel or special fuel was purchased from a retail fuel dealer located on the Indian reservation where the native American is an enrolled member and the fuel was delivered to the native American on that reservation. The refund provisions of this chapter apply to refund claims made under this section.

In the **Effective Date** section beneath the statute, the following information appears:

> "This section is effective for qualifying motor vehicle and special fuel purchases made after December 31, 2004, and is effective until the first day of the first month after the tax commissioner, with the approval of the attorney general, certifies to the governor and the office of the legislative council that an Act of Congress has held or may be interpreted to have held, that a state may impose its motor vehicle and special fuel taxes on native Americans who purchase motor vehicle fuels and special fuels from a retail fuel dealer located on the Indian reservation where the native American is enrolled."

In the **Note** which appears after the **Effective Date** section, it is stated:

> "A new section to Senate Bill No. 2012, as approved by the fifty-ninth legislative assembly, is created and enacted as follows: **LEGISLATIVE INTENT REGARDING INTERPRETATION**. Sections 13 and 16 of this Act may not be construed to preclude claims for motor vehicle and special fuel tax refunds by tribal members or tribal entities for taxes on purchases made before January 1, 2005."

By all appearances, this leaves open the opportunity for the Court to consider whatever backward-looking relief the Court may deem appropriate in this case.

N.D.C.C. 57-43.1-04, **Form of claim for refund,** reads as follows:

> A refund claim must be on a form furnished by the commissioner and must have a written declaration by the claimant that it is made under the penalties of perjury. The tax commissioner may prescribe alternative methods for signing, subscribing, or verifying a return filed by electronic means, including telecommunications, that shall have the same validity and consequence as the actual signature and written declaration for a paper return. The refund claim must state that the motor vehicle fuel was used or is to be used by the claimant other than in a licensed motor vehicle, the purpose or type of project for which the motor vehicle fuel was used, and such other information as the commissioner requires. The original invoices or sales tickets proving the purchase of motor vehicle fuel on which the refund is claimed must be attached to the refund claim. The invoices or sales tickets must include the seller's name and address, the date the fuel was purchased, the type of product, the number of gallons [liters] of motor vehicle fuel purchased, the state tax as a separate item or a statement that the state tax is included in the price, and the name of the claimant. If the original invoices or sales tickets are lost, the claimant may substitute duplicate invoices or sales tickets plus a separate affidavit on forms prescribed by the commissioner. A certified history of purchases detailing

> required information may be accepted by the commissioner in lieu of original sales invoices or sales tickets. A supplier, distributor, or retailer is prohibited from preparing a refund claim for the consumer.

Newly enacted N.D.C.C. 57-01-19, **Claim of unconstitutionality – Refund or credit of taxes paid,** provides as follows:

> Notwithstanding any provision relating to claims for refund or credit of state taxes paid contained in title 57, any claim for a refund or credit of taxes paid based upon a claim that the tax or any provision thereof is unconstitutional under the federal or state constitution must be made within one hundred eighty days of the due date of the return or payment of the tax, whichever occurs first, for which the refund or credit is claimed. A claim for refund or credit of taxes paid before January 1, 2005, based upon a claim that the tax or any provision thereof is unconstitutional that is not filed with the commissioner before July 1, 2005, must be denied. This section does not apply to ad valorem property taxes.

Based upon the Court's review of the applicable law, it seems fairly clear that some Native Americans who have purchased motor fuel on their respective reservations, and have erroneously been required to pay the State's fuels tax on such purchases, may be entitled to refunds. However, in order to qualify for a refund, a claimant must scrupulously comply with

the statutory requirements for obtaining a refund, as set forth in the preceding paragraphs – and the ultimate decision as to whether a particular claimant is in fact entitled to a refund rests with the North Dakota State Tax Commissioner.

In order for the North Dakota State Tax Commissioner to make an informed determination as to whether a particular claimant is in fact entitled to a refund for fuels taxes already paid, the Commissioner must first know what statute of limitations governs claims of this nature.

The Plaintiffs in this case assert that the statute of limitations applicable to contract claims – i.e., the six (6) year statute found at N.D.C.C. 28-01-16(1) – governs their refund claims. In support of this assertion, the Plaintiffs have cited a 1930 case decided by the North Dakota Supreme Court, *Ford Motor Company v. State,* 231 N.W.2d 883,885 (N.D.1930), wherein our high court held that, "[a]uthorities are generally agreed that an action at law for the recovery of taxes illegally collected from a taxpayer and paid by him under protest is one arising upon contract." The opinion in this case does not, however, specifically mention or discuss a statute of limitations period.

The Plaintiffs have also asked the Court to consider the decision in *Standing Rock Sioux Tribe v. Janklow,* 103 F.Supp.2d 1146 (D.S.D.2000), wherein the federal district court found that the six (6) years plus ninety (90) days statute of limitations found at

28 U.S.C. § 2415(a) governed in that case. This statute reads, in pertinent part, as follows:

> "Every action for money damages brought by the United Mates or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues . . . Provided further, that an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued."

103 F.Supp.2d at 1155-56.

The *Standing Rock* court found that the "look-back" period started from the date the complaint was filed. *Id.* at 1156.

This Court further observes that when Judge Holum issued his decision in this case, he determined that this action is one "arising upon contract" – which would bring the six (6) year statute of limitations (of N.D.C.C. 28-16-01(1)) into play.

Recognizing that this action was commenced with service of the Summons and Complaint upon the State on September 22, 2003, the Plaintiffs maintain that refund claims can properly be submitted for motor vehicle fuel purchases made up to six (6) years prior to that date.

The State, on the other hand, argues that it is the *specific* statute of limitations found at N.D.C.C. 57-43.1-05 which governs the refund claims at issue in this case, rather than the *general* statute applicable to contract claims. N.D.C.C. 57-43.1-05 provides, in pertinent part, as follows:

> A refund claim must be filed, for all motor vehicle fuel purchases during a calendar year, on or after January first and before July first of the next year following the year during which the purchase was made, or the claim for refund is barred unless the commissioner grants an extension of time for cause.

The State contends that a *general* statute of limitations does not apply when a *specific* statute of limitations is in place covering the subject matter at hand. In *Johnson v. Nodak Mutual Insurance Company*, 2005 ND 112, 699 N.W.2d 45, the North Dakota Supreme Court was considering what statute of limitations should apply in a case involving the recovery of no-fault benefits by an insured from an insurer. Our high court said, "Under our rules of statutory construction, a specific statute controls a general statute." *Id.* at ¶ 12. The *Johnson* court found that the specific time period limitations prescribed by N.D.C.C. 26.1-41-19, which "govern all actions for basic and optional excess no-fault benefits," were applicable in that case rather than the general six (6) year statute of limitations governing contract actions. The specific statute of limitations which the State

urges the Court to apply in this case states that a refund claim for taxes already paid on purchases of motor fuels must be filed between January 1st and July 1st of the year following the year in which the purchases were made (with certain enumerated exceptions).

It is clear to the Court that for the year 2005, and future years, Native American refund claimants must follow the procedures set forth in N.D.C.C. Ch. 57-43.1. What is *not* clear is how to treat refund claims submitted for taxes paid in connection with pre-January 1, 2005, motor vehicle fuel purchases made by Native Americans on their respective reservations.

Given the Supreme Court's directive (in *Mann v. ND Tax Commissioner*) to the North Dakota Legislature, and bearing in mind what is set forth in the **Note** to newly-enacted N.D.C.C. 57-43.1-03.2, it appears that the Legislature intended to allow enrolled tribal members/tribal entities to obtain tax refunds for motor vehicle fuel purchases made *prior to the effective date of the statute.* The question becomes: Does this mean that the Legislature intended that a claimant would have the ability to obtain a refund for taxes paid in connection with motor vehicle fuel purchases made up to one (1) year prior to the effective date of the statute, three (3) years prior to the effective date, or, even as long as six (6) years? Unfortunately, the Legislative History on SB 2012 provides no guidance to the Court on this issue.

The State's argument appears to be that the limitations period for filing refund claims in N.D.C.C. 57-43.1-05 is both "forward-looking" and "backward looking." However, this argument fails to take into account what is stated in the Note following N.D.C.C. 57-43.1-03.2: "Sections 13 and 16 of this Act may not be construed to *preclude* claims for motor vehicle and special fuel tax refunds by tribal members or tribal entities for taxes on purchases made *before January 1, 2005*." (Italics are the Court's).

The Court finds that the new legislation pertaining to the submission and processing of fuels tax refund claims made by enrolled Native Americans provides no clear indication as to how far back from the effective date of this legislation applications for refunds can be filed. In the absence of any definitive statement in the law, the Court concludes that the six (6) year statute of limitations governing contract claims applies to refund claims submitted by enrolled Native Americans for taxes paid in connection with motor fuel purchases made by them on their respective reservations. However, the Court holds that the six (6) year "look-back" period applies only to refund claims for taxes paid in connection with motor vehicle fuel purchases made during the six (6) year period of time prior to January 1, 2005 (i.e., 1999 through 2004). All refund claims for taxes paid in connection with motor vehicle fuel purchases made on or after January 1, 2005, will be governed by the statute of limitations set out at N.D.C.C. 57-43.1-05.

II.

The Plaintiffs propose that the class in this case consists of "enrolled members who reside on an Indian Reservation, and paid the state fuel tax on a Reservation in ND." *Plaintiffs' Supplemental Brief* p.3.

Rule 23 of the North Dakota Rules of Civil Procedure, **Class actions,** governs with respect to class actions in this state. Rule 23(a), N.D.R.Civ.P., **Commencement of a class action,** reads as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if:
>
> (1) the class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable; and
>
> (2) there is a question of law or fact common to the class.

Rule 23(b), N.D.R.Civ.P., **Certification of class action,** reads as follows:

> (1) Unless deferred by the court, as soon as practicable after the commencement of a class action the court shall hold a hearing and determine whether or not the action is to be maintained as a class action and by order certify or refuse to certify it as a class action.

(2) The court may certify an action as a class action if it finds that (A) the requirements of subdivision (a) have been satisfied, (B) a class action should be permitted for the fair and efficient adjudication of the controversy, and (C) the representative parties fairly and adequately will protect the interests of the class.

(3) If appropriate, the court may (A) certify an action as a class action with respect to a particular claim or issue, (B) certify an action as a class action to obtain one or more forms of relief, equitable, declaratory, or monetary, or (C) divide a class into subclasses and treat each subclass as a class.

Rule 23(c), **Criteria considered,** reads as follows:

(1) In determining whether the class action should be permitted for the fair and efficient adjudication of the controversy, as appropriately limited under subdivision (b)(3), the court shall consider, and give appropriate weight to, the following and other relevant factors:

(A) whether a joint or common interest exists among members of the class;

(B) whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying

adjudications with respect to individual members of the class that would establish incompatible standards of conduct for a party opposing the class;

(C) whether adjudications with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests;

(D) whether a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole;

(E) whether common questions of law or fact predominate over any questions affecting only individual members;

(F) whether other means of adjudicating the claims and defenses are impracticable or inefficient;

(G) whether a class action offers the most appropriate means of adjudicating the claims and defenses;

(H) whether members not representative parties have a substantial interest in individually controlling the

prosecution or defense of separate actions;

(I) whether the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding;

(J) whether it is desirable to bring the class action in another forum;

(K) whether management of the class action poses unusual difficulties;

(L) whether any conflict of laws issues involved pose unusual difficulties; and

(M) whether the claims of individual class members are insufficient in the amounts of interest involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.

(2) In determining under subdivision (b)(2) that the representative parties fairly and adequately will protect the interests of the class, the court must find that:

(A) the attorney for the representative parties will adequately represent the interests of the class;

(B) the representative parties do not have a conflict of interest in the maintenance of the class action; and

(C) the representative parties have or can acquire adequate financial resources, considering subdivision (q), to assure that the interests of the class will not be harmed.

Assuming, for purposes of discussion, that this Court were to determine that the requirements of subdivision (a), Rule 23, N.D.R.Civ.P., have been met – and arguably they *have* – the Court must next determine whether a class action should be permitted for the fair and efficient adjudication of the controversy and whether the representative parties will fairly and adequately protect the interests of the class. N.D.R.Civ.P. 23(b)(2).

As indicated above, Rule 23(c), N.D.R.Civ.P., sets out a number of factors the Court is required to consider in determining whether a class action should be permitted for the fair and efficient adjudication of the controversy. What follows is the Court's evaluation and assessment of each of these factors in light of the circumstances of this case.

(A) *whether a joint or common interest exists among members of the class*

A common interest exists among enrolled members of the Three Affiliated Tribes, the Turtle Mountain Band of Chippewa and the Spirit Lake Sioux in securing refunds of motor vehicle fuel taxes paid by them in connection with fuel purchased by them on their respective reservations.

Consideration of this factor weighs in favor of *granting* class certification in this matter.

NOTE: The Plaintiffs concede that the proposed class action will not include enrolled members of the Standing Rock Sioux Tribe, as that tribe has entered into a tax agreement with the State which provides that fuel taxes collected from fuel sales made on the Standing Rock Reservation are returned to the tribe on a percentage basis.

(B) *whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for a party opposing the class*

Under the newly-enacted statutory procedure for obtaining refunds of fuels taxes paid by Native Americans, all refund claimants must provide the same documentation to the Tax Commissioner in order to qualify for refunds. Whether a refund will be granted in a particular case is dependent upon a claimant's ability to provide the Tax Commissioner with the requisite proof of that claimant's on-reservation purchase of motor fuel and payment of the fuels tax. There is, therefore, no risk of inconsistent or varying adjudications with respect to individual members of the class – as each refund claim will stand, or fall, on its own merits.

Consideration of this factor weighs in favor of *denying* class certification in this matter.

(C) *whether adjudications with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests*

Given the fact that each refund claim must necessarily stand, or fall, on its own merits, adjudications with respect to individual members of the class as a practical matter will *not* be dispositive of the interests of other members (of the class) not parties to the adjudication, or impair or impede in any manner their ability to protect their interests.

Consideration of this factor weighs in favor of *denying* class certification in this matter.

(D) *whether a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole*

The Court view [sic] this to be a "non-factor" in this matter.

(E) *whether common questions of law or fact predominate over an questions affecting only individual members*

While it can be assumed that all members of the proposed class will have in common the fact that they made on-reservation purchases of motor fuel, and the fact that they paid the fuels tax on such purchases, the Court finds that these commons questions of fact do *not* predominate over questions affecting only individual members. Once again, eligibility for refunds will be determined on a *case-by-case basis,* and while one claimant may be able to come up with the requisite proof to support his/her claim for a refund, another claimant may well come up short in this endeavor.

Consideration of this factor weighs in favor of *denying* class certification in this matter.

(F) *whether other means of adjudicating the claims and defenses are impracticable or inefficient*

The Court finds that other means of adjudicating the claims and defenses are *not* impracticable or inefficient. In fact, because the very nature of the refund process dictates that each refund claimant prove his/her entitlement to a refund with information that only he/she possesses, other means (than a class action) of adjudicating the claims and defenses *are more* practical and efficient here.

Consideration of this factor weighs in favor of *denying* class certification in this matter.

(G) *whether a class action offers the most appropriate means of adjudicating the claims and defenses*

It has already been judicially determined that imposition of the State's fuels tax in connection with on-reservation purchases of motor fuel by enrolled Native Americans is illegal. With this threshold determination having been made, those persons seeking refunds of taxes already paid should logically be required to resort to the refund process specifically designed by the Legislature in response to *Mann v. N.D. Tax Commissioner*, 2005 ND 36, 692 N.W.2d 490.

Consideration of this factor weighs in favor of *denying* class certification in this matter.

(H) *whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions*

The Court views this to be a "non-factor" in this case.

(I) *whether the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding*

The Court views this to be a "non-factor" in this case.

(J) *whether it is desirable to bring the class action in another forum*

The Court views this to be a "non-factor" in this case.

(K) *whether management of the class action poses unusual difficulties*

The Court views this to be a "non-factor" in this case.

(L) *whether an conflict of laws issues involved lose unusual difficulties*

The Court views this to be a "non-factor" in this case.

(M) *whether the claims of individual class members are insufficient in the amounts of interest involved in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class*

Recognizing that the Legislature has now provided enrolled Native Americans with what appears to be a very straightforward, relatively uncomplicated, method of making claims for refunds of fuel taxes erroneously paid, refund claimants should be able to process their individual claims with minimal difficulty – outside the court system.

Consideration of this factor weighs in favor of *denying* class certification in this matter.

In line with the foregoing analysis, the Court is persuaded that class certification should *not* be

granted in this situation – and the Plaintiffs' request for such certification is *denied*.

III.

The Plaintiffs contend that interest is properly payable on any refunds they are successful in obtaining, in accordance with N.D.C.C. 28-20-34.

In *Standing Rock Sioux Tribe v. Janklow*, 103 F.Supp.2d 1146, ¶ 36 (D.S.D.2000), the federal district court found that the State of South Dakota was required to refund *with interest* all motor vehicle excise taxes erroneously paid pursuant to the South Dakota tax statute in question.

This holding by the court in South Dakota persuades this Court that interest should likewise be awarded to those enrolled Native Americans in this state who are successful in obtaining refunds of fuel taxes erroneously paid.

IV.

Recognizing that Mr. Gillette has taken this case on a contingency fee basis, and apparently has a fee agreement with the Plaintiffs, the Court will not interject itself into that agreement and will take no action concerning Mr. Gillette's request that his fee agreement with the Plaintiffs be approved.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The Plaintiffs' Motion to Declare Refund Process Unlawful is **DENIED**.

2. The Plaintiffs' Amended Motion for Summary Judgment & Class Relief is **GRANTED**, to the extent that the Court finds the six (6) year statute of limitations applicable to retrospective applications for fuels tax refunds by enrolled Native Americans.

3. The Plaintiffs' Amended Motion for Summary Judgment & Class Relief is **GRANTED**, to the extent that the Court has determined that interest is properly payable on refunds obtained by successful claimants.

4. The Plaintiff's request for class certification is **DENIED**.

5. The Plaintiffs' Motion for Leave to File Amended Motion for Declaratory Relief on Refunds is **DENIED**. The relief sought by the Plaintiffs in this motion has been addressed by the Court in this Memorandum and Order.

The Court having ruled on all pending motions, and there being no unadjudicated claims pending in this matter, the Court hereby certifies this Order as being a *final* Order for purposes of Rule 54(b), N.D.R.Civ.P.

The Court requests that counsel for the State prepare appropriate Findings of Fact, Conclusions of Law and Order for Judgment, and Judgment, for the Court's consideration – within thirty (30) days of the date of this Memorandum and Order.

Dated at Minot, North Dakota, this 17*th* day of April, 2006.

BY THE COURT:

/s/ William W. McLees
William W. McLees
District Judge

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER ON PETITION FOR REHEARING

Supreme Court No. 20060366

Appeal from the District Court for Mountrail County.

Joan Mann, Ken Danks d/b/a TEK Industries, Tracy Wilkie, Christa Monette, and other persons similarly situated,	**Plaintiffs and Appellants**
v.	
North Dakota Tax Commissioner, Cory Fong,	**Defendant and Appellee**
and	
North Dakota Treasurer, Kelly Schmidt,	**Defendant**

This appeal having been heard by the Court at the April 2007 Term and an opinion having been filed on July 25, 2007, by:

Chief Justice Gerald W. VandeWalle, Justice Dale V. Sandstrom, Justice Mary Muehlen Maring, Justice Carol Ronning Kapsner and Justice Daniel J. Crothers;

and a petition for rehearing having been filed by Vance Gillette, counsel for the Appellant, and the Court having considered the matter, it is hereby ORDERED AND ADJUDGED, that the petition be and is hereby **DENIED**.

AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.

Dated: August 22, 2007

By the Court:

/s/ Gerald W. VandeWalle
Chief Justice
North Dakota Supreme Court

Attest: /s/ Penny Miller
Clerk of the SupremeCourt

Seal

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF MOUNTRAIL — NORTHWESTERN JUDICIAL DISTRICT

Joan Mann, Ken Danks d/b/a TEK Industries, Tracy Wilkie, Christa Monette, and other persons similarly situated,

Plaintiffs,

v. — No. 03-C0085

ND Tax Commissioner, Rick Clayburgh,

Defendant.

PLAINTIFF'S MOTION TO DECLARE REFUND PROCESS UNLAWFUL

1. Introduction. Plaintiffs challenges a state refund process that does not provide for a hearing or allow presentation of evidence on fuel tax refund claims.

2. Refund law. 57-43.1-04 NDCC form of claim, allows refunds on actual receipts, certified history, or copy and affidavit. It limits refunds to farmers and industry. The statue and admin. regulations do not provide for a hearing or consideration of other proof (than actual receipts).

3. The state refused refunds to plaintiff Danks per letter of 2002, saying Native Americans could not

get refunds over fuel used in licensed vehicles. 1-2 (letter and affidavit). Plaintiffs secured an injunction in January 2004 against the fuel tax on Indians.

4. On April 23, 2005 the ND Legislature enacted a law that allows refunds for Indian claimants on fuel taxes starting January 1, 2005. 57-43.1-03.2 NDCC (which incorporates the actual receipt requirement of Ch. 57-43).

5. On April 25, 2005 the defendant tax commissioner had 2 checks cut as refunds for plaintiff Ken Danks, for the period 2000-03, of around $3,900. In early May 2005 the state sent the checks for Danks. Danks rejected the state "offer to settle the entire case" for $3,900 as the class was not paid. Letter to State, Req. to Admit (June 2005). The putative class is 4,000 Indians who reside on a reservation and paid the fuel tax. The class consists of persons who have actual receipts (est. 1,000) and those who have other forms of proof (est. 3,000) such as mileage logs, or other records.

6. Injury. The state system deprived plaintiff Danks of his property as follows. a) the state checks are insufficient amounts for each year, and they do not compensate for the years claimed since 1997. See pls. motion for summary judgment & class relief.

b) No hearing is allowed so plaintiff Danks could not dispute the refund amounts, or present other evidence (than actual receipts) to support his refund claims.

c) The state deprived plaintiff Danks (and class) of valuable funds. The state takes $1.1 million per year (low end est.), and rakes in interest of over $500,000. $7.7 million (7 years) invested = considerable interest (on funds illegally taken from Indians).

7. For year 2004 plaintiff Danks submitted a refund claim for himself, and on behalf of the class (4,000 Indians), as a protective measure. Plaintiffs contend the class should be certified for years back. See plaintiffs' motion to certify class, and pls. June 13, 2005 brief.

8. Though Indian claimants can apply for refunds for year 2005 (during the 2005 on small claims, and by July 1, 2006 on larger claims), the state demands actual receipts. 57-43.1-03.2 NDCC. Plaintiff Danks is harmed because he has proof (other than actual receipts) to prove amounts paid, but cannot present such evidence as no hearing allowed.

9. Due process. The state's refund system is flawed: no chance to present admissible evidence in a hearing, or chance to contest a refund amount. The states' draconian system is contrary to due process and case law that requires a "clear and certain" remedy on refunds. See pls. supporting brief.

10. While Indians are denied refund hearings, other are allowed a full evidentiary hearing. NL *Industries v. ND State Tax Comm.*, 498 N.W. 2d 141 (ND 1993) (admin. hearing allowed over corporation refund issue). This unequal treatment is contrary to equal protection.

WHEREFORE plaintiffs are entitled to a ruling as follows:

1. an order should issue that the state's refund law and process, as applied, violates due process and equal protection. Plaintiff Danks is not seeking an individual damage determination at this point. Interest is sought in pls. motion for summary judgment & class relief.

2. Refund process. A ruling should issue that allows an Indian claimant to present evidence in an admin. process; to allow use of other proof such as mileage logs or other records (than actual receipts); if a refund or interest amount is disputed for a hearing with an ALJ. The order should require the defendant to submit such standards to the court for approval. The order would apply to pending class claims, and for refunds under the 2005 refund law.

3. Fees and costs should be awarded, and other relief deemed just.

Dated: June 22, 2005.

/s/ Vance Gillette
Vance Gillette
PO Box 1577
Minot, ND 58702
701 858 0667
Attorney for Plaintiffs

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF MOUNTRAIL

NORTHWESTERN JUDICIAL DISTRICT

Joan Mann, Ken Danks d/b/a TEK Industries, Tracy Wilkie, Christa Monette, and other persons similarly situated,

Plaintiffs,

v.

No. 03-C-0085

ND Tax Commissioner, Rick Clayburgh,

Defendant.

AFFIDAVIT OF PLAINTIFF KEN DANKS

1. The facts in plaintiffs' motion to declare refund process unlawful are true and correct.

2. First, the defendant or state said Native Americans could not get refunds over fuel used in licensed vehicles. Exhibits 1-2 (letter and affidavit). Plaintiffs secured an injunction in January 2004 against the fuel tax on Indians.

3. In April 2005 the ND Legislature enacted a law that allows refunds for Indian claimants on fuel taxes starting January 1, 2005. 57-43.1-03.2 NDCC incorporates the actual receipt requirement of Ch. 57-43. The actual receipt requirement is discriminatory

as no other forms of proof is allowed, no hearing is allowed, while others get full hearings on tax issues.

4. In May 2005 the state sent me partial refund checks of $3,900 which I rejected as insufficient amounts. And the state attempt to "buy off" the cease was inadequate as the class was not paid. An Indian claimant cannot get a full refund as no hearing is allowed in which evidence can be presented.

5. I request this court issue a order that myself and other Indians are given a chance in a fair process. Only after a fair hearing can the refund amounts due me and others be determined.

/s/ Ken Danks
Ken Danks

State of North Dakota

County of McKenzie

Subscribed and sworn to before me this 6 day of July 2005.

/s/ Dennis E. Karnatz
Notary Public

DENNIS E. KARNATZ
Notary Public State of North Dakota
My Commission Expires April 20, 2007

[SEAL] **STATE OF NORTH DAKOTA**
OFFICE OF STATE TAX COMMISSIONER
CORY FONG, COMMISSIONER

Claimant:	Tracy A. Wilkie
Address:	PO Box 2 Belcourt, ND 58316-2017
Identification No:	SS#501-
Refund Period:	Calendar Year 2005
Tax Type:	Motor Vehicle Fuel – Tax Type 61

Notice of Denial
Motor Vehicle Fuel Tax Refund Claim

You are hereby notified that your claim for a motor vehicle fuel tax refund filed pursuant to refund provisions in North Dakota Century Code Chapter 57-43.1 is denied.

Refund Claimed:	$	105.70
Refund Approved:	$	-
Refund Denied:	$	105.70

The denial is based upon:

Documents submitted in support of claim do not meet statutory requirements.

Invoices do not show state tax as a separate item or include a statement that the tax is in the price.
Invoices do not include the claimant's name.
Statements sent as verification that the state tax is included in the price do not identify the purchaser nor the time period covered by the statement. One statement does not include the seller's name.

The rejected documents are returned with this Notice.

You are hereby further notified that unless you file a written notice of protest with the Office of State Tax Commissioner no later than 30 days after service of this Notice upon you, this denial of your claim for a refund will be finally and irrevocably fixed. A copy of the pertinent portions of the North Dakota Taxpayer Bill of Rights is enclosed with this Notice.

Dated: February 6, 2006

Cory Fong
Tax Commissioner

/s/ Joan Galster
Joan Y. Galster, Supervisor
Motor Fuel Tax Section

Date:

To: Office of State Tax Commissioner

Re: ND State Tax

This is verification that North Dakota State tax is included in our gas prices.

/s/ Ken L. Davis [La Dots]
Manager
1/22/06

WELCOME TO LADOTS CONOCO
HWY 5
BELCOURT, ND
LADOTS CONOCO
HWY5
BELCOURT, ND 58316

Descr.	qty	amount
UNLD CA #07	9.2636	25.00
	@ 2.699/ G	
	Sub Total	25.00
	Tax	0.00
	TOTAL	**25.00**
	CASH $	25.00

REG# 0001 CSH# 030 BR# 01 TRAN#19757
08/21/05 20:53:28 ST# DOTS1

Originals –

Returned by N.D. Tax Dept to Tracy Wilkie 2/06
Refund Denied.